Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS CUNNINGHAM,

Petitioner,

v.

UNITED STATES,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SEVENTH CIRCUIT APPLIED A LESS STRINGENT

STANDARD TO ANDERS V. CALIFORNIA, 386 U.S. 738 (1967) IN GRANTING DEFENSE COUNSELS ANDERS MOTION, FINDING THAT THERE WERE NO MERITORIOUS ISSUES FOR APPEAL DENYING DEFENDANT A RIGHT TO AN APPEAL,

PARTIES TO THE PROCEEDING

Thomas Cunningham is the sole Defendant in this case.

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No. _____

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THOMAS CUNNINGHAM,

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL
FOR THE SEVENTH CIRCUIT.

Petitioner, Thomas Cunningham, respectfully prays that this Court issue a Writ of Certiorari from the decision from the Seventh Circuit, finding that the filing of an Anders brief instead of an appeal in his case was sufficient.

OPINION BELOW

A copy of the 7th Circuit opinion in this case is attached to the Appendix.

The 7th Circuit affirmed trial counsel's refusal to file an appeal and instead file a brief pursuant to *Anders v. California*, *386* U.S. 738 (1967) in finding that the defense counsel's performance was not negligent and that no prejudice resulted from the errors or omissions of defense counsel. **U.S. v. CUNNINGHAM, 09-3201 (7th Cir. 9-9-2010)** Decided September 9, 2010.

JURISDICTION

The Seventh Circuit entered it's opinion, affirming the U.S. District Court for the Northern District of Illinois on September 9, 2010. This Writ is being timely filed within 90 days of that judgment plus a 60 day extension which was granted in Application No. 10A537 extending the date to February 6, 2011 which falls on a Sunday making the Writ due on February 7, 2011.

THE STATUTE OR CASE INVOLVED

This Writ involves the interpretation and application of the U.S. Supreme Court

case of Anders v. California.

STATEMENT OF THE CASE

Following a jury trial, Defendant was found guilty of one count of bank robbery, see 18 U.S.C. Sec. 2113(a) and sentenced to 180 months' imprisonment, 30 months below his guideline range of 210 to 240 months. Cunningham appeals, but his appointed counsel concluded that the appeal is frivolous and moves to withdraw under Anders v. California, 386 U.S. 738 (1967). Cunningham was indicted and charged with robbing the First Savings Bank of Hegewisch in Lansing, Illinois. Defendant allegedly demanded money from a teller with a not that said to fill the bag with money and not to scream.

REASONS FOR GRANTING WRIT

This Writ should be granted because the denial of a right to appeal "was contrary to, or involved an unreasonable application of clearly established

Federal law as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). Specifically, the Court misapplied the case of Anders v. California, 386 U.S. 738 (1967) and imposed a heightened standard to bringing an appeal and the merits of an appeal. Defendant was wrongfully denied a right to an appeal.

APPELLANT'S RESPONSE TO APPOINTED APPELLATE COUNSEL'S MOTION TO WITHDRAW PURSUANT TO ANDERS V. CALIFORNIA

Prejudice must be presumed from appointed counsel's failure to file a non-frivolous appeal in this case. The California Supreme Court interpreted Anders in *People v. Feggans*, 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr 419 (1967), and later in *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979).

> "Counsel must prepare a brief to assist the court in understanding the facts and the legal issues in the case. The brief must set forth a statement

> of the facts with citations to the transcript, discuss the legal issues with citations of appropriate authority, and argue [all], issues that are arguable ... if counsel concludes that there are no arguable issues and the appeal is frivolous, he may limit his brief to a statement of the facts and the applicable law and may ask to withdraw from the case, but he (must not argue the case against the client)."

The Supreme Court later described Anders as but one approach and left the courts free to pursue equivalent or better alternatives. See *Smith v. Robbins*, 528 U.S. 259, 66 Crl 323 (2000). On July 15, 2009, the Indiana Supreme Court rejected Anders approach for handling meritless defense appeals. In an opinion by Justice Theodore R. Boehm, the Court held:

"An attorney who withdraws pursuant to Anders must still review the record, complete at least some legal – research, consult and advise the client, and draft a brief for

submission to the court of Appeals, ... Any saving of time and effort by counsel in preparing an Anders brief is offset by increased demands on the judiciary, which is to some extent placed in the precarious role of advocate. ... And if the reviewing court finds any meritorious issues, even more time and money must be spent in substituting new counsel and starting the Appeal all over again."

The Court also voiced concern regarding the fairness of the protocol that allows counsel to set a tone for an Appeal that "invites perfunctory review." It said, "In a direct Appeal, a convicted defendant is entitled to a review by the judiciary, not be overworked and underpaid public defenders."

DID APPOINTED APPELLATE COUNSEL FAIL TO CONSIDER CHANGE IN THE LAW WHEN FILING ANDERS BRIEF IN THIS CASE?

On June 15, 2009, Appellant filed a pro-se styled supplement to his sentencing memorandum and objection to (PSR) that read:

"Federal judges who disagree with policy decisions made by the U.S. Sentencing Commission, when it promulgated the career offender provisions to the U.S. Sentencing Guidelines, are now free to impose lower sentences on career offenders,"

citing United States v. Boardman (2008), as the controlling case.

Appellant argued that, in *U.S. v. Sanchez*, 517 F.3d 651 (2nd Cir. 2008), for the reasons that follow, we conclude that the granting of a reasonable non-guideline sentence or larger downward departure was not barred by 28 U.S.C. § 994(h), by its terms, is a direction to the Sentencing Commission, not to the Court, and it finds no analog in title 18 U.S.C. or 21 U.S.C."

"While the sentencing statute especially directs the District Court to consider the sentencing range established for the applicable category of defendant set forth in the Guidelines, 18 U.S.C. § 3553(a) 4 (a), it does not instruct the Court to impose such a sentence." R: at 12.13 – 13:24.

The Government during their sentencing related recommendations rebutted Appellant's non-frivolous argument with one sentence which the sentencing Court gave considerable weight when it imposed a sentence in this case.

"Mr. Cunningham, just a few minutes ago, cited you some case from the Seventh Circuit that 'The Court' has observed that Booker does not affect 28 U.S.C. 994 § (h), which calls for Career Offenders to be sentenced" at or near

"the statutory maximum." R: at 21:23 – 22:2.

Prior to Appellate Counsel filing her Anders brief in this case, the en banc ruling in the Seventh Circuit eliminated a circuit split March 17, 2010, by overriding a year-old en banc ruling that had required district judges to treat "as mandatory" the sentences provided for career offenders in section 4B1.1 of the United States Sentencing Guidelines.

The earlier ruling, in *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009), had found support in other circuits' decisions that have since gone by the wayside, and the Department of Justice had refused to defend Welton's reasoning.

Appellant's Appointed Appellate Counsel, Johanna M. Christiansen, argued on behalf of Markus L. Welton on June 1, 2009, before this Court. Welton was overturned by United States v. Corner, (12010 U.S. App. LEXIS 5498). Subsequent to the decision in Welton, the U.S. Solicitor General, in *U.S. v. Vasquez*, 558 F.3d 1224 (11th Cir. 2009), disavowed the circuit court's analysis, and the justices remanded the case for reconsideration in light of the Government's position.

Similarly, the out-of-circuit decision that the Welton Court had cited as supporting its understanding, *U.S. V. Jiminez*, 512 F.3d 1 (1st Cir. 2007), was overtaken by the First Circuit's decision in United States v. Boardman, the

U.S. Solicitor General's support for Corner's position, and the vacatur of Vasquez, occurred after Welton and were not considered in that decision.

The decisions on which Welton principally relied, including *Untied States v. Harris*, 536 F.3d 798, 813 (7th Cir. 2008); United States v. Clanton, 553 F.3d 652, 660 (7th Cir. 2008); and United States v. Millbrook, 553 F.3d 1057, 1067 (7th Cir. 2009) likewise were overruled on this issue. Corner's sentence was vacated, and the case remanded for sentencing.

Appellant cited United States v. Boardman as the controlling case during sentencing arguments, R: at 12:24 – 13:1, thus preserving this issue for review by this Court on direct appeal. However, [all] of Appellant's arguments in their entirety were passed over in silence by the sentencing court.

In a Seventh circuit case defendant's sentence was vacated and remanded because the district court passed over the defendant's request for 100-month sentence in silence; by doing so, the instant court could not be sure that the district court even considered the factors relevant to sentencing raised by the defendant, let alone whether it abused its discretion in doing so.

(The temptation for a busy judge to impose the guideline sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored, Cunningham, at 697.)

Appellant began his sentencing argument:

"I'm asking the Government to provide authority, and the Court for reasoning, if it applies a career offender enhancement in this case." R: at 6:19 – 6:21, (the sentencing judge may not rest on the guidelines alone, but must if asked by either party, consider whether the guideline sentence actually conforms, in the circumstances, to the statutory factors), *United States v. Dean*, 414 F.3d 725, 727 (7th Cir. 2005).

To be sure appellant filed a motion pursuant to Fed. R. Crim. P. Rule 35(a), to correct clear error, for the sentencing court to correct the fact it passed over in silence all of Appellant's principle arguments. The Court may have been spared this appeal; however, the court denied Appellant's motion by stating in his explication:

> "In his motion, Defendant asks the Court to reduce his sentence to 51-63 month's imprisonment. In support,

> Defendant presents arguments that he made to the Court to and which the court rejected, during his sentencing hearing. It is Defendant's position that the Court's rejection of his arguments constitutes the sort of clear error which Rule 35(a) is intended to remedy. Defendant is wrong."

In *United States v. Cunningham*, 429 F.3d 673, 675 (7th Cir. 2005), (a judge who fails to mention a ground of legal merit (provided it has a factual basis) is likely to have committed error oversight).

The record is completely void of any such rejection of Appellant's sentencing arguments or any consideration for that matter as to any of Appellant's non-frivolous arguments presented during his sentencing hearing.

The sentencing court, ruling it rejected Appellant's sentencing arguments in their entirety, imposed a sentence in accordance with the (mandatory sentencing enhancement), held in U.S. v. Welton, under 4B1.1.

APPELLATE COUNSEL'S CONCLUSION IN HER ANDERS BRIEF ANY ARGUMENT CHALLENGING CUNNINGHAM'S SENTENCE WOULD BE FRIVOLOUS WHERE HIS SENTENCE WAS NOT IN VIOLATING OF THE LAW, WAS NOT THE RESULT OF AN INCORRECT APPLICATION OF THE GUIDELINES, AND WAS NOT UNREASONABLE, MUST FAIL.

A. SEVENTH CIRCUIT'S CURRENT APPELLATE REVIEW OF SENTENCES.

Since *United States v. Booker*, 543 U.S. 220 (2005) made the sentencing guidelines advisory, the Appellate Court reviews federal criminal sentences for reasonableness in light of the statutory factors in 18 U.S.C. § 3553(a). *United States v. Hollins, 498 F.3d 622, 629 (7th Cir. 2007); United States v. Acosta, 474 F.3d 999, 1001 (7th Cir. 2007).*

The Appellate review standard is the same reasonableness inquiry that guides the District Court. *United States v. Hankton*, 463 F.3d 626, 629 (7th Cir. 2006). The Court continues to review the judge's application of the guidelines **de novo** and his factual findings for clear error. Hollins, 498 F.3d at: 629; *United States v. Bothun*, 424 F.3d 582, 586 (7th Cir. 2007). Clear error will be found when review

of all the evidence leaves the Court with the definite and firm conviction that a mistake has been made. Hollins, 498 F.3d at 629.

Appellate Counsel's assertion that Appellant has not preserved the sentencing Court's application of the (U.S.S. G. § 4B1.1 MANDATORY GUIDELINE ENHANCEMENT) is erroneous. See Anders Brief PG – 51, A. Standard of review. The Seventh Circuit has held that the defendant does not have to explicitly object on reasonableness grounds below in order to preserve the issue, unlike an appeal from a new sentence imposed after revocation of supervised release. *United States v. Castro*-Juarez, 425 F.3d 430, 433 (7th Cir. 2005).

> THE COURT: We will proceed as we are required to do to determine the guidelines. The base offense level is 20, any disagreement to that?
>
> THE DEFENDANT: Not at all.
>
> THE COURT: Okay. There is a 2-point increase, property or financial institution was taken. Any objection to that?
>
> THE DEFENDANT: No, I don't have objection to that, your Honor.
>
> THE COURT: There is a – pursuant to 4B1.1,

according to the PSI, the defendant is a career offender, which would raise the offense level to 32. It is my understanding that you object t6o that finding; is that correct, Mr. Cunningham?

THE DEFENDANT: Absolutely, your Honor. R: at: 3:13 – 4:2.

Defendant went on to argue during his sentencing proceedings:

> "When calculation the criminal history, as a result of the application of the United States Sentencing Guidelines in place on the date of sentencing, as in this case ... "mandates" the Court to determine an offender who has been prison one time a (career offender). This contradicts practical sense, and defies all precedents I am aware of. I couldn't find any case law on it. I'm asking the Government to provide authority, and the Court reasoning if it ... applies a career offender "enhancement" in this case."

B. SEVENTH CIRCUIT'S CURRENT RELEVANT LEGAL PRINCIPLES.

Prior to Booker, the Court could not review a sentence that fell within the guideline range under the sentencing Reform Act of 1984. Now the guidelines are advisory, (any sentence that is unreasonable is unlawful), and therefore can be reviewed under 18 U.S.C. § 3742(a).

"Because sentences within the guideline range are presumptively but not conclusively reasonable, we are ... authorized to entertain contentions that a particular guideline sentence is unreasonably high." *United States v. Boscarino*, 437 F.3d 634, 637 (7th Cir. 2006).

The District Court does not "enjoy the benefit of a legal presumption that the guidelines sentence should apply," *Rita v. United States*, 127 S.Ct. 2456. 2465 (2007).

The Court tried to distill a definition of reasonableness, or what it would on review consider "unreasonable," still further in United States v. Wallace, 458 F.3d 606 (7th Cir. 2006), borrowing from its own precedent in other contexts and the Second Circuit, the Court stated that unreasonable means something lying well outside the boundaries of permissible differences of opinion. Wallace 458 F.3d at 610. Further, a result will be unreasonable if it exhibits tension with

governing Supreme Cou8rt precedents or is inadequately support by the record or arbitrary. Id.

THIS COURT'S STANDARD OF REVIEW AS IN ALL APPELLATE CASES IS UNDER GALL V. UNITED STATES, 169 Led 2d 445, 552 128 S.Ct. 2007

(Federal Court of Appeals held required to review all criminal sentences – whether inside, just outside, or ---- significantly outside the Federal Sentencing guidelines under a deferential abuse of discretion standard.)

It must first ensure that the district court committed no significant procedural error.

Appellant raises issues in his response to Appellate Counsel's Anders brief in accordance with *United States v. Schuh*, 298 F.3d 968 (7th Cir. 2002), the Seventh Circuit confine our reviews of the record to potential issues raised in each attorney's facially-adequate brief an Appellant's Rule 51(b) response.)

1. The sentencing court committed significant procedural error by treating the guidelines as mandatory in Appellant's case. *Gall v. United States* U.S.S. Ct. 128 2007. Appellant's guideline range was incorrectly calculated under the sentencing guidelines; Appellant

was incorrectly classified as a career offender; the application of the guidelines at the time of sentencing under amendment 709, violated the Ex Post Facto Clause Art. 1 – Sec. 9, U.S. Const. and Appellant's sentence was unreasonable.

After complete review of the sentencing transcripts, the Court's response to the Government's sentencing argument that the Seventh Circuit "mandate" that Booker does not affect 28 U.S.C. § 994(h), which calls for career offenders to be sentenced "at or near" the statutory maximum was explicit on the record." R: at 36:29 – 21.

THE COURT: "You do qualify as a career offender, which gives you a much higher sentence than you would have without being a career offender."

"So it is my judgment that the range, based upon – which is basically greatly raised by virtue of the finding of your career criminal status, does overstate in my opinion somewhat your criminal history." R: at 37:21 – 23.

"Having said all that, I think that based upon your criminal history enhancement which I believe somewhat overstates your criminal history."

The statutory maximum range in Appellant's case is from 0 to 240 months. Appellant was effectively sentenced

"at or near" his statutory maximum range to a term of imprisonment of 180 months, (reasonable is a range, not a point), Cunningham, 419 F.3d at 679.

In *U.S. v. Heldeman*, 402 F.3d 220 (1st Cir. 2005), remand for resentencing was required due to the trial court's use of mandatory Guidelines at sentencing.

The Court went on to state: (as in Appellant's case), "The record contains some indication that the district court felt itself constrained by the guidelines." In particular, the Court noted that Heldeman's arguments were legitimate and somewhat mitigating and should be considered where within the guidelines Heldeman's sentence should fall."

Appellate counsel stated in her Anders brief: "The Court clearly evaluated Cunningham's arguments and the § 3553(a) factors and determined he should receive a sentence below the low end of the applicable guideline range."

"The sentence imposed in this case was 30 months below the low end of the advisory range of the sentencing ... guidelines, based upon factors in § 3553(a, and reflect significant consideration of the competing goals of sentencing." *U.S. v. Lopez*, 430 F.3d 854, 857 (7th Cir. 2004). "Therefore, there is no argument on Appeal that Cunningham's sentence is unreasonable." See Anders brief PG – 56.

Appellant's argument is anchored by Supreme Court Justice Scalia's cocurring opinion in Kimbrough v. United States, that the District Court cannot treat the guidelines as "mandatory" irrespective of reasonableness for sentencing purposes.

"If there is any thumb on the scales, if the application of §3553(a) factors is entirely reasonable, then the advisory guideline would, over a large expanse of their application, entitle the defendant to a lesser sentence but for the presence of certain additional facts found by a judge rather than a jury. This, as we said in Booker, would violate the Sixth Amendment."

In Booker, the Supreme Court held that the guidelines mandatory sentence enhancements that raised the top end of the presumptive range violated the Sixth Amendment when they were based on judge-found facts. See Synopsis (BNA), 4-7-10, Oral Argument (Dillon v. United States, U.S.,, argued 03.30.10).

A sentence 30 months below the advisory guideline range, effectively sentencing Appellant "at or near" his statutory maximum, cannot be deemed reasonable when it was imposed under the "mandatory career offender enhancement" pursuant to § 4B1.1 U.S.S.G. Guidelines.

In *United States v. Boardman*, 528 F.3d 36: (2008 U.S. App. LEXIS 12420), the Government responds that the District Court knew it had discretion and, in fact, exercised it by varying downward by almost 50 months, from a guideline range of 140-175 months.

"But the question to deviate on what grounds, and we think the District Court (without the benefit of Kimbrough's clarification) "underestimated" what he was entitled to do." Boardman, 528 F.3d.

The Seventh Circuit concurring with Boardman's reasoning in a dissenting opinion in *United States v. Welton*, 583 F.3d 501 (7th Cir. 2009), before Circuit Judges Williams, Rovner, and Wood. "Questioned," "So which part of the career offender guideline remains advisory?"

"If, for instance, a Court were to consider a defendant's criminal history or the nature of his crime (factors permitted under 18 U.S.C. § 3553(a)1(a), in issuing a below-guideline sentence, would that determination amount to an unauthorized policy disagreement with the directive?"

Section 994(h), clearly specifies that ... the defendants convicted of certain crimes (who meet other certain criteria) should be subject to a guideline range "at or near" the maximum penalty, and a Court that deviates from this range

is essentially saying that the guideline sentence is too high. Welton, 583 F.3d at 501.

United States v. Corner made clear (as it applies in Appellant's case), "Further reflection has led us to conclude that the Justices' reference to § 994(h) in Kimbrough does not equate § 4B1.1 with either § 994(h) or the statutory maximum sentence must be "at or near."

APPELLANT WAS INCORRECTLY CLASSIFIED AS A CAREER OFFENDER; THE APPLICATION OF THE GUIDELINES UNDER AMENDMENT 709 VIOLATED THE EX POST FACTO CLAUSE ART. – 1 SEC. – 9, U.S. Const.

Arguably Appellant would not have been considered a career offender under the 2006 U.S.S.G. § manual in place at the time of the instance offense. This Court's holding in United States v. Welton rendered any application of 4B1.1. (legally binding) regulation, notwithstanding amendment 709. Therefore, any imposition of the (mandatory career offender enhancement) pursuant to the 2008 U.S.S.G. § manual used at the time of ... Appellant's sentencing violated the Ex Post Facto Clause because of its retrospective application. Art. – 1- Sec. – 9, U.S. Const.

Appellant finds support in *Untied States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), (We conclude that the Ex Post Facto clause should only apply to laws and regulations that bind rather than advise.)

Appellate Counsel stated in her Anders brief, "Furthermore, they were not (Appellant's prior sentences) consolidated for trial or sentencing," though offers no proof to support her claim. R at see Anders brief PG – 54 and 55. The Government chose not to argue the issue at sentencing therefore acquiesced.

To be sure, appellant centered his argument around the facts supporting Appellant's prior sentences were consolidated, and that one sentence was effectively imposed by the Court. Appellant provided the Court with sentencing attachments which include which include certified convictions from the State of Illinois I.D.O.C. that proved:

On April 16, 1990, Appellant was arrested for all (SIX) robberies and (ONE) attempted robbery by the Chicago Heights Police Department. Chicago Heights Police recovered an unloaded BB gun from Appellant's vehicle. (NOT A FIREARM AS APPELLANT COUNSEL SUGGESTS.)

Appellant was taken into State Custody (STATE PROCEEDINGS CONTROLLED). Appellant was

subsequently released to Federal Authorities and sentenced on January 3, 1991 in the United States District Court to a term of 57 months. Chief Judge Moran signed an order remanding Appellant back to State Custody to dispose of the initial State charges stemming from the April 16, 1990 arrest. App: at #8.

On August 19, 1991, Appellant was sentenced to Twelve Years incarceration, the maximum term of the aggregate sentence. Separate consolidation orders and Mittimus were issued beginning with case No. 91 – CR – 13311, through 91 – CR – 13316 to run concurrently with each other and the Federal Sentence.

On August 16, 1991, Appellant was sentenced to Eight Years in Will County (case No. 90 – CF – 1795). Consolidation order was issued by the State Court to run concurrently with each case out of Cook County (90 – CR – 13311 through 90 – CR – 13316) and the Federal case No. (90 – CR – 362). .

Appellant also tendered to the court the N.C.I.C. and INTERPOL rap sheets that correlate the date of arrest by the Chicago Heights Police Department on (April 16, 1990), through Appellant's release from the Illinois Department of Corrections I.D.O.C. on December 22, 1995 from Western Illinois Correctional Center.

Appellant's sentencing argument clearly established his (ONE) prior arrest was considered (ONE), single sentence and comports with this Court's standard of review in *U.S. v. Vellejo*, 373 F.3d 855 (7th Cir. 2004), citing *United States v. Joseph*, 50 F.3d 402 (7th Cir. 1995), (formal consolidation order is not required for there to be consolidated sentencing for the purposes of sentencing guidelines dealing with calculation of criminal history.) U.S.S.G. 4A1.2(a)(2). R: at 8:15 through 11:25.

If Congress were to make amendment 709 retroactive, Appellant would be prejudiced due to amendment 709's retroactive effect, coupled with its retrospective application pursuant to U.S. v. Demaree, 459 F.3d 791 (7th Cir. 2006), which held that (post Booker, there is no Ex Post Facto issue when the Court applies the guidelines in place on the date of sentencing, regardless of whether those guidelines are harsher than the guidelines that existed at the time the defendant committed the offense.)

(Criticized in *United States v. Gilman* (2007, CA1 Mass) 478 F.3d 440) and cert. denied (2007, U.S.), 127 S.Ct. 3055, 168 L.ED 2d 767 and (criticized in Michael v. Ghee, (2007, CA6 Ohio), 498 F.3d 372, 2007 FED App. 305P), and (criticized in United States v. Restrepo-Suares, (2007, D.C.

Dist. Col.), 516 F Supp. 2d 112).

Either scenario will in essence act as a (silver bullet), Appellant would be doomed. (The Ex Post Facto Clause prohibits the retrospective application of criminal laws that materially disadvantage the defendant), *Weaver v. Graham*, 450 U.S. 24, 28, 29, 101 S.Ct. 960 67 Led 2d. 17 (1981)..

Under the 2006 U.S.S.G. § in place at the time of Appellant's offense, he would face a sentence range of 51-63 months, rather than the top end of the presumptive range, between 210-262 months, a 211-month variance from the bottom end of Appellant's guideline range pursuant to the 2006 sentencing guidelines.

United States v. Corner (2010 U.S. App. LEXIS 5498) obviates the Seventh Circuit's reasoning in United States v. Demaree (pursuant to 4B1.1 "mandatory" enhancement imposed in Appellant's case).

"That because the guidelines are "advisory," a judge has discretion in sentencing that removed the Ex Post Facto problem from the equation." Demaree 459. F.3d at 792.

Appellant finds support in United States District Court Chief Judge James F. Holderman's proposed testimony to the United States Sentencing Commission on September 1, 2009 just six days after Appellant was sentenced in this case:

"Secondly, the relevant Sentencing Guideline Manual that should be used in sentencing is a source of frustration for many of our Judges. The Seventh Circuit has decided in a case called *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 127 S.Ct. 2005 (2007) that there is no Ex Post Facto violation in using the newer versions of the guidelines than they are ultimately uncomfortably with."

Appellant's sentence must be vacated and his case be remanded for resentencing in light of this Court's ruling in United States v. Corner (2010 U.S. App. LEXIS 5498), No. 08 – 1003, March 3, 2010, submitted en banc March 17, 2010, decided while Appellant's appeal was pending before this Court.

(Using actual innocence exception to vacate sentence after parties erroneously stipulated that defendant qualified as a career offender under sentencing guidelines), *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994).

APPELLATE COUNSEL'S CONCLUSION IN HER ANDERS BRIEF PREJUDICIAL TESTIMONY DURING TRIAL WAS HARMLESS ERROR MUST FAIL

Appellate Counsel submits in her Anders brief that the Government eliciting

prejudicial testimony was harmless error for trial purposes. However, the Sentencing Court gave "explicit attention" to this testimony when sentencing Appellant. The sentencing court gave his reasons for imposing a sentence "at or near" the statutory maximum of the presumptive range, and what he said was this:

"I have been wrestling with what I consider to be an appropriate sentence. There are a number of reasons why we sentence people. Seriousness of the offense. To promote respect for the Law, and to provide just punishment art he particular reasons, and the other one, which is very important, to afford adequate deterrence to criminal conduct."

Appellate Counsel omitted the following caption in its entirety of the Court's statement on the record. R: at 37:14 – 20.

> *"**Now you did a pretty long stretch in prison after your armed robbery spree, and it seemed like it at least deterred you from violent conduct for a long period of time. I'm not sure I fully understand the reasons you gave for robbing this bank, but there was however, a bank robbery in Dyer, Indiana, which was fairly close to the**

bank that you robbed." (appellate Counsel's omissions of the sentencing court statement in her Anders brief). RECORD OMITTED FROM COUNSEL'S STATEMENT OF FACTS 7 – 28.

The Court gave substantial weight to immaterial fact of a separate bank robbery that occurred the same day over 10 miles from the bank that Appellant was convicted of robbing. That bank robbery ended in a violent carjacking, and the suspects were reported to have driven the getaway vehicles into a building that caught fire, while fleeing from Police. R: at 37:14 – 20.

The court drew an infe3rence that Appellant was somehow connected to this bank robbery, not accepting Appellant's reason he gave that were substantiated on the record.

"My daughter was born into love. I raised my daughter with every day I can give her, according to traditional conservative values. She is my life.

"I went to work to provide at Stuever & Sons, at Ford, at Toyota, and was unable to pay the $450.00 a week in child support obligations." R: at 28:20 – 25. see also docket entry 124, 125, affidavit of filing of attachments in support of sentencing.

"The total weekly obligation is $450.00 a week, that included $150.00 a week in full coverage health care and life insurance, which I maintained, deducted directly from payroll, mandated by Court Order. I have exhibit E that has the Court Order in there." R: at 31:16 – 20.

"So I ran to Florida, there I panhandled and sold fish fro my meals. I came back to Illinois and I lived in a little guard shack. My friend and long-time Professor at Purdue and Devry University got me out of there." R: at 28:25 – 29:4.

The Court was clearly influenced by the Government's eliciting of prejudicial testimony that defense Counsel objected to during trial. see R: at 116:19 – 118:14:

MR. CLARK: Your Honor, I object to this. This has nothing to do with this defendant, absolutely nothing, and if this is an attempt to somehow paint him for being responsible for a robbery at another bank that happened far away is ---

THE COURT: Overruled. This is just background information. R: at 116:19 – 118:14.

In United States v. Polson, 285 F.3d 563 (7th Cir. 2000), the Court's standards of review (A district court cannot rely on inaccurate information in sentencing a defendant, a sentence based on inaccurate information must be set aside.)

The Polson Court, like Appellant's, did not accept Polson's explanation of the incident, though determined that the Government had established by the preponderance of the evidence, and through Polson's admission (he had been babysitting the girl while she was going through potty-training and that she had a diaper rash in her vaginal area, to which he had attempted to apply Neosporin.)

Polson's admission that he had applied Neosporin to the three-year-old girl's rash indicated that he had touched the girl in the way she later described.

THE SEVENTH CIRCUIT REVIEWS THE DISTRICT COURT'S FACTUAL DETERMINATIONS WITH RESPECT TO SENTENCING FOR CLEAR ERROR

In *U.S. v. Santiago*, 495 F.3d 820 (7th Cir. 2007), the Court held that: (evidence supporting a factual determination will satisfy due process, for sentencing purposes, if it bears a sufficient indicia of reliability to support its probably accuracy).

Where the defendant on review contends that the sentencing court relied on inaccurate information, the Seventh Circuit must determine whether the inaccuracy, if proven, played a roll in sentencing. *United States v. Salinas*,

365 F.3d 582, 587 (7th Cir. 2004), "A Sentencing Court demonstrates actual reliance on misinformation when the court gives 'explicit attention' to it, 'found[s]' its sentence 'at least in part' on it, or gives 'specific consideration' to the information before imposing sentence." *Salinas, 365 F.3d at 586, quoting United States v. Tucker, 404 U.S. 443, 447 (1972), and Lechner v. Frank, 341 F.3d 635, 639 (7th Cir. 2003).*

The Sentencing Court clearly relied on testimony that was elicited by the Government during trial, without any factual determination of supporting evidence, and does not satisfy this Court's standard in *U.S. v. Santiago*, 495 F.3d 820 (7th Cir. 2007) of due process for sentencing purposes. Appellant's argument is right on point with U.S. v. Salinas, where as the Sentencing Court in this case, "explicit attention" to immaterial testimony, "found" its sentence on that ... immaterial testimony, and "specific consideration" to this immaterial testimony.

Therefore, Appellate Counsel's conclusion that Appellant's sentence was not imposed in violation of the law just fail.

A defendant has a Constitutional right to be sentenced on the basis of accurate information. *United States v. Townsend, 73 F.3d 747, 751 (7th Cir. 1996); United States v.*

Coonce, 961 F.3d 1268, 1275 (7th Cir. 1992); United States v. Johnson, 489 F.3d 794, 797 (7th Cir. 2007).

This Court must consider the significant procedural error by the Sentencing Court relying on immaterial or inaccurate information on imposing a sentence. *Gall v. United States,* 169 Led 2d 445, 552 128 S.Ct. (2007).

APPELLATE COUNSEL'S CONCLUSION IN HER ANDERS BRIEF APPELLANT'S SENTENCE IS REASONABLE MUST FAIL

Prior to Booker, the Court could not review a sentence that fell within a guideline range. Now that the guidelines are advisory, any sentence that is unreasonable is unlawful and therefore can be reviewed under 18 U.S.C. § 3742(a).

Pursuant to Fed. R. Crim. P. 35(a), the Court shall correct a sentence that is determined on Appeal under 18 U.S.C. § 3742 to have been imposed in violation of the law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable.

To be sure Appellant raised § 3553(a) factors in response to the Government's argument, "Sentencing deviations from the career offender guideline range, your Honor, has the potential to create substantial unwarranted disparity among

career offenders." R: at 21:16 – 22.

In *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009), Circuit Judges Williams, Rovner and Wood questioned in their dissenting opinion:

"Alternatively, if a Court wanted to rely on § 3553(a)(6) and issue a below-guideline sentence to avoid any 'unwarranted sentencing disparities,' between individual defendants, is it prohibited from doing so whenever the ... disparity originates from § 994(h)'s directive?"

The Circuit Judges in their dissenting opinion went on to say:

"The problem with the panel's reasoning is that it can be applied to prohibit any determination, individualized or otherwise, that a career offenders' guideline sentence is excessive – notwithstanding the fact that the sentencing court's discretion to reach this conclusion is the prominent feature of an "advisory" rather than "mandatory guideline,""

Appellant presented to the court in his sentencing memorandum and reiterated the unwarranted sentencing disparity among similarly situation defendants in the Seventh Circuit in his motion to correct clear error pursuant to Rule 35(a).

In *United States v. Bangstrong* (7th Cir. 2009), before

Chief Judge Michael P. McCuskey in the Central District of Illinois, sentencing Bangstrong to a term of imprisonment of 88n months as a career offender for four armed bank robberies, attempting to kill innocent pedestrians, and Police Officers.

See also United States v. Pallowick, 364 F.Supp 2d 923 (E.D. Wisc. 205), (Defendant was convicted of six armed bank robberies and advisory guideline range was 70-87 months, the Sentencing Court imposed a sentence of 46 months because no one was hurt and defendant made no threats of harm).

The language that qualifies how judges are to calculate sentences, 3553(a), is called the Parsimony Provision. It qualifies the four purposes of sentencing set forth in section § 3553(a)(2):

A. Retribution (to reflect seriousness of the offense, to promote respect for the law, and to provide just punishment);

B. Deterrence;

C. Incapacitation (to protect the public from further crime); and

D. Rehabilitation (to provide defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective

manner).

Appellant's statutory range is from 0-240 months. Consider parts (b) and (c) of section § 3553(a)(2), "deterrence: and "incapacitation" (to protect the public from further crimes).

The mandatory "Career Offender Enhancement" that was imposed pursuant to § 4B1.1 U.S.S.G. effectively sentencing Appellant "at or near" his statutory maximum, which in this case is 180 months, is closer to near a life sentence as Appellant noted in his sentencing memorandum PG – 4, "Defendant is 45 years old, even the low end of 210 months would be ... tantamount to a life sentence." Appellant also stated during his sentencing, "If I even make it out of prison, I will be in my 60s, your Honor."

Appellant was 46 at the time of sentencing, with one prior arrest over 19 years prior to Appellant's sentencing that counted toward the "mandatory 4B1.1 enhancement," which was the armed robbery spree (with an unloaded BB gun), the Court noted. R: at 37:15.

The Government summed up Appellant's character in one paragraph; the Government identified tattoo work "he had done" "the last time he was in prison, I don't know what else he did ..." R: at 22:6-7.

The Government in one rote statement said:

"It tells you a little insight into the man and what he is capable of doing while in prison, and while he is out of prison, he is clearly a recidivist, your Honor."

Appellant's personal characteristics belief the Government's assertions and remains (UNDISPUTED) for the record:

"I built the A.N.V.I.S., Aviator Night Vision Imaging System, for the F-16 fighter Jet while I was in prison. I built the U.S. Patriot missile Command Harness. I built the Side-Winder missile Command Harness, and I worked on the M1A1 Tank Assemblies." R: at 27:9 – 15.

After Appellant's (one term of imprisonment), he was the owner of Thomas Adam Hair Salon, Inc. in Munster, Indiana, which initially held over $75,000 in revolving accounts at the Lansing Branch (First Savings Bank of Hegewisch), "the same bank Appellant robbed." see App # 32, 33, 34, 35, 36, 37, 38, 39 (General Counsel Armand E. Capanna's response to Appellant's subpoena for bank records which include $8,500 deposit – joint account, $7,365 deposit – business account revolving, and $12,908 transaction – balance business account F.S.B. Hegewisch Lansing branch).

Appellant maintained full time employment for Ford,

Toyota; Appellant is a devoted Father (paying $295.00 in child support, in addition to $150.00 per court order for his daughter Christine's health and life insurance for a total of $450.00 weekly. That was deducted directly from Appellant's earnings beginning in 2004). Appellant did not accrue arrearage until his incarceration in this case. see App #s 24, 25, 26, 27, and record at 28:23 – 29:10.

R: at 28:2 – 28:15

"Appellant headed a program, *Coaches v. Cancer*. Ron Long, the area director for Applebee's, latched on along with Rosati's Pizza chain, Hollywood Video, Eyeglass Emporium, Pete's Treats. Local Coaches from Munster High School, Highland High School, and Hammond High School would schedule outings in front of my shop and teach fundamental athletics and ethics to kids in the surrounding area. One hundred percent of the proceeds went t5o local cancer centers. This program was supervised by an accounting firm. My salon also made substantial donations to the Munster Performing Arts Center as well."

Appellant was homeless, living in the Broward Partnership for the Homeless, in Fort Lauderdale, Florida. Then, Appellant lived in an abandoned guard shack in a local landfill in (unincorporated Ford Heights) in Illinois.

Appellant served one prior prison term for ... robberies he committed while on a crack-cocaine binge with an unloaded BB gun. Appellant committed this robbery out of haste, not harshness. He was on his bicycle, did not threaten or hurt anyone; Appellant was under the influence of alcohol and was arrested with a note in his pocket that said, "GIVE." see App: at 40.

(IS TANTAMOUNT TO A LIFE SENTENCE REASONABLE?)

CONCLUSION

It was stated in Penson v. Ohio (1988), 488 U.S. 75, 102 Led 2d 300, 109 S.Ct., 346, a case in which the Supreme Court reversed the state appellate court judgment which had been rendered after that court had refused to provide counsel to brief and argue an indigent criminal defendant's first appeal as of right, that the Fourteenth Amendment guarantees a criminal appellant the right to counsel on first appeal as of right. The Court said that (1) the need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from trial to appellate state, and (2) both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to insure that rights are not

foregone and that substantial legal and factual arguments are not inadvertently passed over. An unrepresented appellant was similar to an unrepresented defendant at trial, the court further observed, in that both were unable to protect vital interest at stake.

WHEREFORE APPELLANT respectfully requests this court make an assessment of his issues presented in response to appointed appellant counsel's Anders Brief; deny counsel's motion to withdraw in light of this court's decision in *United States v. Corner, (2010 U.S. App. LEXIS 5498)*, in consideration of appointed appellate counsel's experience in *United States v. Welton, 583 F.3d 494 (7th Cir. 2009)*, if deemed appropriate allow her to proceed to oral argument on behalf of Appellant; or any other relief this Court considers just and fair.

For the above and foregoing reasons, Thomas Cunningham respectfully requests that this Court grant the Writ of Certiorari.

Respectfully submitted,

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INDEX TO THE APPENDIX

7th CIRCUIT OPINION

U.S. v. CUNNINGHAM, 09-3201 (7th Cir. 9-9-2010)

U.S. v. CUNNINGHAM, 09-3201 (7th Cir. 9-9-2010)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS CUNNINGHAM,

Defendant-Appellant.

No. 09-3201.

United States Court of Appeals, Seventh Circuit.

Submitted September 8, 2010.

Decided September 9, 2010.

[EDITOR'S NOTE: This case is unpublished as indicated by the issuing court.]

Before WILLIAM J. BAUER, *Circuit Judge* RICHARD A. POSNER, *Circuit Judge* DIANE P. WOOD, *Circuit Judge*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 07 CR 605-1.

Harry D. Leinenweber, *Judge*.

ORDER

Following a jury trial, Thomas Cunningham was found guilty of one count of bank robbery, *see* 18 U.S.C. § 2113(a), and

sentenced to 180 months' imprisonment, 30 months below his guidelines range of 210 to 240 months. Cunningham appeals, but his appointed counsel has concluded that the appeal is frivolous and moves to withdraw under *Anders v. California*, 386 U.S. 738 (1967). We review only the issues presented in counsel's facially adequate brief and in Cunningham's response. *See* CIR. R. 51(b); *United States v. Schuh*, 289 F.3d 968, 973-74 (7th Cir. 2002).

Cunningham was indicted on October 10, 2007, and charged with robbing the First Savings Bank of Hegewisch in Lansing, Illinois. He moved in May 2008 to have the

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indictment dismissed for violation of the Speedy Trial Act; the district court denied the motion. Trial began on December 15, 2008, and the jury found Cunningham guilty the next day.

Counsel first considers whether any violation of the Speedy Trial Act occurred, given that 430 days passed between the indictment and trial. A defendant must be tried within 70 days of his indictment or his first appearance before a judge, *see* 18 U.S.C. § 3161(c)(1), but certain periods of time are excluded from the 70-day calculation, *see* 18 U.S.C. § 3161(h). The total unexcused delay here did not approach 70 days. As counsel notes, the district court properly invoked the "ends of

justice" exception, *see* 18 U.S.C. § 3161(h)(7)(A), to exclude the time from Cunningham's arraignment on October 16, 2007, to May 7, 2008, for preparation of pretrial motions, for plea negotiations, and for new attorneys to familiarize themselves with Cunningham's cases. *See* 18 U.S.C. § 3161(h)(7)(A), (B)(iv); *Bloate v. United States*, 130 S. Ct. 1345, 1357-58 (2010); *United States v. Napadow*, 596 F.3d 398, 404-05 (7th Cir. 2010); *United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987). The court also appropriately excluded the time from when Cunningham filed his motion, on May 7, to its denial of the motion on July 16. *See* 18 U.S.C. § 3161(h)(1)(D); *Bloate*, 130 S. Ct. at 1353; *Napadow*, 596 F.3d at 406. And the court properly excluded the time from July 16 to December 1 for trial preparation and continuity of counsel. *See* 18 U.S.C. § 3161(h)(7)(A), (B)(iv); *Napadow*, 596 F.3d at 405; *United States v. Santos*, 201 F.3d 953, 959 (7th Cir. 2000). Even if the final two-week delay until the trial began on December 15 were improperly excluded, no violation of the Speedy Trial Act occurred.

Counsel next considers whether the district judge should have recused himself because an Assistant United States Attorney prosecuting the case had previously served as his law clerk. Before the trial began, Judge Leinenweber

denied Cunningham's motion to disqualify himself under 28 U.S.C. § 455. Denial of such a motion, however, can be challenged only with a writ of mandamus — not on appeal after the proceeding is complete. *See Tezak v. United States*, 256 F.3d 702, 717 n. 16 (7th Cir. 2001). (We previously denied Cunningham's petition for a writ. *See In re Cunningham*, No. 08-4203 (7th Cir. Dec. 19, 2008) (order).) And the record contains no evidence of actual bias that would require recusal under 28 U.S.C. § 144. *See Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 717-18 (7th Cir. 2004).

Counsel also examines whether the district court abused its discretion when it granted seven of the government's motions in limine. The motions in limine sought to exclude, among other things, evidence regarding the potential penalties Cunningham faced if convicted; the government's motivation for prosecuting the case; the impact a conviction would have on Cunningham's family; and evidence that Cunningham was coerced, unless he could meet the burden of proof necessary for that defense. But we would conclude that Cunningham waived any argument regarding these motions because his trial counsel

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expressly declined to object to the court's decision to grant

them. *See United States v. Murry*, 395 F.3d 712, 717 (7th Cir. 2005); *United States v. Cooper*, 243 F.3d 411, 416 (7th Cir. 2001).

Counsel also considers whether the district court improperly denied several of Cunningham's objections during trial. He objected, for example, to the government's introduction of a letter from an attorney at the Federal Deposit Insurance Corporation as proof that the bank was insured by the FDIC. But an affidavit from the FDIC can be used to confirm a bank's insured status, so challenging the court's decision to allow that evidence would be frivolous. *See United States v. Hampton*, 464 F.3d 687, 690 (7th Cir. 2006). Cunningham also objected to certain testimony that arose at trial: testimony about another bank robbery that occurred nearby on the same day; a witness's use of the word "robber" to describe the person who took the money from the bank; the government's asking a teller how she felt during her interaction with Cunningham on the day of the robbery; and the government's asking a teller if she said, "Oh my God," upon recognizing Cunningham after his arrest as the bank robber. But, as counsel acknowledges, any erroneous evidentiary rulings would have been harmless in light of the overwhelming evidence of Cunningham's guilt. *See* FED. R.

CRIM. P. 52(a); *United States v. Cooper*, 591 F.3d 582, 590 (7th Cir. 2010).

Counsel next considers whether the district court erred when it barred two defense witnesses from testifying about Cunningham's personal circumstances. Cunningham sought to have the witnesses testify that he was homeless and owed money before the bank robbery, but the court properly concluded that the testimony was irrelevant to the issues at trial or his defense. *See United States v. Woolsey*, 535 F.3d 540, 549 (7th Cir. 2008).

Counsel then considers whether there was sufficient evidence to convict Cunningham. We would review any challenge to the sufficiency of the evidence in the light most favorable to the government, and reverse only if no reasonable factfinder could find Cunningham guilty. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). To convict Cunningham, the government had to prove that he took money belonging to the bank from the person or presence of another by force and violence, or by intimidation. *See* 18 U.S.C. § 2113(a); *United States v. Carter*, 410 F.3d 942, 952 (7th Cir. 2005). Counsel notes that, at trial, Cunningham did not deny taking the bank's money from a teller; the only issue was whether he used intimidation to take it.

Intimidation requires that a defendant's words and actions cause an ordinary person to feel threatened, by giving rise to a reasonable fear that resistance will be met with force. *See United States v. Thornton*, 539 F.3d 741, 748 (7th Cir. 2008); *United States v. Burnley*, 533 F.3d 901, 903 (7th Cir. 2008). The teller testified that Cunningham approached her window and gave her a bag and a note that read, "Give me all your money," and that he said, "Don't move and don't scream." The teller then put all of the money from her drawer into the bag. From such testimony, we would conclude that the teller reasonably felt threatened, *see United States v. Clark*, 227 F.3d 771, 775 (7th Cir. 2000),

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and so a challenge to the sufficiency of the evidence used to convict Cunningham would be frivolous.

Counsel also looks at the district court's decision to let Cunningham proceed pro se during sentencing. After Cunningham told the court in February 2009 that he would rather represent himself at sentencing than continue with his trial counsel, the court granted his request without conducting a hearing. Any valid waiver of a right to counsel must be knowing and intelligent. *See Faretta v. California*, 422 U.S. 806, 835 (1975); *Cooper*, 591 F.3d at 587. Although

the court did not conduct a hearing, other evidence in the record would convince us that Cunningham understood the risks of proceeding pro se. *See United States v. Johnson*, 534 F.3d 690, 693-94 (7th Cir. 2008). Cunningham first sought to represent himself in May 2008, at which time the court advised him that "you should think about it carefully." He answered affirmatively when the court asked, "Do you understand that there are a lot of problems with representing yourself?" and "Do you understand that it is undoubtedly prejudicial to your case not to have a lawyer?" The court noted that Cunningham was "adamant" in his desire to represent himself — despite warnings about the hazards of doing so — and agreed to discharge his appointed counsel. Given Cunningham's willingness to disregard the risks of proceeding pro se earlier in the case, we would not conclude that the court abused its discretion when it allowed him to represent himself at sentencing.

Counsel also considers whether Cunningham could argue that he received ineffective assistance from his trial counsel, but recognizes that such a claim is best reserved for collateral review. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003); *United States v. Recendiz*, 557 F.3d 511, 531-32 (7th Cir. 2009).

Cunningham seeks in his Rule 51(b) response to raise several arguments regarding his sentence, most of which stem from his contention — also explored by counsel — that the district court improperly classified him as a career offender. But when the district court determined at sentencing that — based on a 1990 federal conviction for armed bank robbery and separate state-court convictions in 1991 for armed robbery in Cook County and Will County — he was a career offender under U.S.S.G. § 4B1.1, Cunningham concurred, "Absolutely, and I don't have an objection to that," and even characterized the language of the guideline as "clear and unambiguous." We would therefore conclude that he waived any argument on appeal regarding his career-offender status. *See United States v. Adcock*, 534 F.3d 635, 641-42 (7th Cir. 2008); *United States v. Sanchez*, 507 F.3d 532, 539 (7th Cir. 2007).

Cunningham also asserts that the district court improperly relied on immaterial information at sentencing when it observed that another bank robbery took place nearby to the bank that Cunningham robbed. This contention is frivolous — nothing in the record suggests that the court relied at all on that information.

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Finally, Cunningham argues that his sentence was

unreasonable. But, as counsel recognizes, the court gave careful consideration to the 18 U.S.C. § 3553(a) sentencing factors and — believing the guidelines overstated Cunningham's criminal history — imposed a below-guidelines sentence, so any challenge to the reasonableness of the sentence would be frivolous. *See United States v. Chess*, 610 F.3d 965, 967 (7th Cir. 2010).

We GRANT counsel's motion to withdraw and DISMISS the appeal.

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/ S / Marianne Mann Hannigan